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No. 91-946

In the Supreme Court of the United States

OCTOBER TERM, 1991

CHURCH OF SCIENTOLOGY OF CALIFORNIA, PETITIONER

v.

UNITED STATES OF AMERICA and FRANK S. ZOLIN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether an appeal from an order enforcing an administrative summons becomes moot when the materials sought by the summons have been produced pursuant to the order.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-2a) dismissing the appeal as moot is unreported.[1] The orders entered by the district court (Pet. App. 3a-11a) on March 13, April 15, May 21, 1991, are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 1991. The petition for a writ of certiorari was filed on December 9, 1991 and granted on March 2, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] The prior opinion of the court of appeals (Pet. App. 13a-15a) following remand from this Court in *United States* v. *Zolin*, 491 U.S. 554 (1989), is reported at 905 F.2d 1344, cert. denied, 111 S. Ct. 1309 (1991).

STATEMENT

1. In 1984, the Internal Revenue Service (IRS) commenced an investigation of the tax returns of L. Ron Hubbard, founder of petitioner (the Church of Scientology), and others, for tax years 1979-1983. In July 1984, Los Angeles newspapers reported that former Church of Scientology officials had testified in a state court action in California (*Church of Scientology* v. *Gerald Armstrong*, No. C 420 153 (Cal. Super. Ct. Aug. 10, 1984)) that millions of dollars had been transferred from various Scientology entities to Hubbard in the late 1970's and early 1980's. As part of its investigation, the IRS served an administrative summons on the Clerk of the Los Angeles County Superior Court seeking certain documents contained in the record of the state court case.[2] The Clerk's Office, however, refused to produce 13 documents that had been ordered sealed by the Superior Court. Pet. App. 29a. The IRS then brought this proceeding in federal district court to enforce its administrative summons. See *United States* v. *Zolin*, 491 U.S. 554, 557-558 (1989).

Petitioner and Mary Sue Hubbard intervened to oppose production of the sealed documents. Petitioner claimed that sealed Exhibit 5-C—which contains tape recordings of two meetings between various attorneys and representatives of petitioner and L. Ron Hubbard (the MCCS tapes)—was protected by the attorney-

[2] The Internal Revenue Service is authorized to issue summonses to obtain production of "any books, papers, records, or other data" that "may be relevant" in "determining the liability of any person for any internal revenue tax" (26 U.S.C. 7602(a)(1)). The district courts have jurisdiction to enforce compliance with these administrative summonses. 26 U.S.C. 7402(b), 7604(a).

client privilege. The government contended, however, that the MCCS tapes fell within the crime-fraud exception to the privilege. See 491 U.S. at 558; Pet. App. 37a.[3] The district court ruled that the MCCS tapes contained confidential attorney-client communications, that the privilege had not been waived and that the crime-fraud exception to the attorney-client privilege did not apply. See 491 U.S. at 559.[4]

[3] Affidavits submitted by the government alleged that the taped meetings "focused generally on the intentional violation of the tax laws" and specifically discussed "i) a proposed scheme whereby the Church's cash transfers to Hubbard would be disguised as payments for services rendered (allegedly to insulate Hubbard from tax liability and to protect the Church's tax-exempt status), and ii) a proposed scheme whereby Hubbard would be able to control royalty income * * * without that control being traceable to him." *United States* v. *Zolin*, 809 F.2d 1411, 1418-1419 (9th Cir. 1987); Pet. App. 40a-41a.

The government also submitted partial transcripts of the MCCS tapes. The special agent assigned to the investigation stated in his declaration that these partial transcripts had been obtained by the IRS prior to issuance of the summons from a confidential source who was not a party to the litigation in the Superior Court. See *United States* v. *Zolin*, 491 U.S. at 559 n.5. In its prior opinion in this case, this Court assumed, without deciding, that the transcripts were legally obtained. *Id.* at 558-559 & n.5.

[4] At petitioner's request, the district court directed the IRS not to deliver the summoned information to other government agencies except under certain, limited circumstances (Pet. App. 4a, 46a). The court of appeals upheld that restriction (*id.* at 35a-36a) and this Court affirmed its judgment on that issue by an equally divided vote (*United States* v. *Zolin*, 491 U.S. at 561). That aspect of the district court's order is not now before this Court. We note, however, that other courts have concluded that such restrictions on the use of documents produced pursuant to summons are not valid. See *United States* v. *Barrett*, 837 F.2d 1341, 1349-

2. The court of appeals affirmed. *United States* v. *Zolin*, 809 F.2d 1411 (9th Cir. 1987).[5] The court held that the crime-fraud exception may be invoked to compel disclosure of otherwise privileged communications only when the movant has first established, with evidence independent of the communications themselves, a *prima facie* case of fraud. *Id.* at 1418-1419; Pet. App. 40a-41a. The court concluded that there was insufficient "independent evidence" to establish that the crime-fraud exception was applicable to the MCCS tapes. *Ibid.*

This Court granted certiorari and, on June 21, 1989, held that the allegedly privileged materials may be reviewed *in camera* to determine whether they fall within the crime-fraud exception. *United States* v. *Zolin*, 491 U.S. at 562-575. Such review is proper when the requesting party has presented relevant, non-privileged evidence supporting "a reasonable belief that *in camera* review may yield evidence that establishes" the applicability of the crime-fraud exception. *Id.* at 574-575.

3. On remand, the court of appeals examined the partial transcripts of the tapes, along with the independent evidence that it had reviewed in its first

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1351 (5th Cir. 1988) (en banc), cert. denied, 492 U.S. 926 (1989).

[5] L. Ron Hubbard died on January 24, 1986, during the pendency of the appeal. The court of appeals rejected petitioner's suggestion that Mr. Hubbard's death made enforcement of the summons moot, because the IRS retained power to investigate the potential civil liability of the estate of Mr. Hubbard (and of other parties) following his death. Pet. App. 30a; 809 F.2d at 1414. See also *United States* v. *Author Services, Inc.*, 804 F.2d 1520, 1522 n.1 (9th Cir. 1986). For the same reason, this Court stated that it was "satisfied that a live controversy remains." 491 U.S. at 557 n.3.

opinion, and found "sufficient evidence of intended illegality to establish that the tapes are within the crime-fraud exception" (Pet. App. 14a-15a). *United States* v. *Zolin*, 905 F.2d 1344 (9th Cir. 1990).[6] In so ruling, the court of appeals stated (Pet. App. 15a):

> The partial transcripts demonstrate that the purpose of the MCCS project was to cover up past criminal wrong-doing. The MCCS project involved the discussion and planning of future frauds against the IRS, in violation of 18 U.S.C. § 371 * * * [and the] figures involved in MCCS admit on the tapes that they are attempting to confuse and defraud the U.S. Government. The purpose of the crime-fraud exception is to exclude such transactions from the protection of the attorney-client privilege.

On September 19, 1990, the court of appeals denied petitioner's request for rehearing and suggestion for rehearing en banc. Pet. App. 12a. Petitioner then filed a petition for a writ of certiorari with this Court.

4. Petitioner did not seek a stay of mandate pending disposition of its petition for a writ of certiorari. When the court of appeals issued its mandate, the district court ordered the MCCS tapes to be produced to the government.[7] On petitioner's motion, however,

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[6] The court of appeals ruled that, by not raising it on the first appeal, petitioner had waived the claim that the government had illegally obtained the partial transcripts (Pet. App. 15a n.2). See also Pet. App. 42a-43a; note 3, *supra*.

[7] Petitioner suggests (Pet. Br. 7) that the United States could have contended that the case became moot at this stage of the litigation, when the records were produced temporarily under the district court's order. We do not agree. The temporary possession of documents that occurs before effective inspection and duplication transpires does not con-

the district court thereafter ordered the government to return the tapes to the clerk of the district court until this Court acted on the then-pending certiorari petition from the judgment of the court of appeals (Pet. App. 7a-11a). On March 18, 1991, this Court denied the petition for a writ of certiorari in *Church of Scientology* v. *United States*, 111 S. Ct. 1309. Upon denial of the petition, the decision of the court of appeals holding that the documents were within the crime-fraud exception to the attorney-client privilege—and were therefore properly subject to the summons—became a final, nonappealable judgment.[8]

Petitioner nonetheless renewed its objection to the release of the tapes in the district court on the same grounds previously urged in the court of appeals: that the partial transcripts submitted to the court by the IRS had been obtained illegally; that the tapes were not relevant to any ongoing IRS investigation;

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stitute full compliance with the summons. In any event, the controversy was reinstituted when the Untied States Attorney returned the records to the district court without inspecting or making or keeping a copy of them. Upon return of the documents, the district court ruled that "the previous stay of delivery of the MCCS tapes should remain in effect until the Petition for Certiorari is ruled upon" (Pet. App. 8a).

[8] Having rejected all of petitioner's objections to production, the court of appeals directed the district court on remand to "admit the MCCS tapes into evidence, subject to any objections the parties might make at that time" (Pet. App. 15a). The district court properly construed the court's mandate to require production of the documents pursuant to the IRS summons (*id.* at 9a), since all issues relevant to that determination have now "long since been determined" (*ibid.*) by the Supreme Court and the court of appeals.

and that the MCCS tapes contained no evidence of a crime or fraud (see Pet. App. 7a-11a, 15a & n.2, 30a; 491 U.S. at 557 n.3). In response to petitioner's renewed efforts to relitigate the merits of the question whether the documents should be produced, the district court observed that petitioner "cannot win in this court a case which it lost in the Supreme Court and the Court of Appeals" (Pet. App. 6a). Noting that "[l]itigation must end sometime" (*ibid.*), the district court entered its order requiring the documents to be delivered to the IRS and refused to stay its order pending appeal. The court did, however, grant a brief, temporary stay to allow petitioner an opportunity to seek a stay pending appeal from the court of appeals (*ibid.*).

5. On May 6, 1991, the court of appeals denied petitioner's motion for a stay. Petitioner's application to this Court for a stay was denied by Justice O'Connor on May 8, 1991. The MCCS tapes were then released to the United States Attorney for copying, and those copies were delivered to the Internal Revenue Service for its review. The original documents from which the copies were made were then returned to the Clerk of the state court. Pet. Br. 8.

On May 24, 1991, petitioner filed a renewed emergency motion for a stay pending appeal. On May 30, 1991, the court of appeals denied that motion and ordered petitioner to show cause why its appeal should not be dismissed as moot.[9] On September 10, 1991, the court of appeals dismissed the appeal, concluding that this case is moot because "the tapes have been turned over to the IRS in compliance with the summons enforcement order" and no actual, present

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[9] On May 31, 1991, the Church filed a second emergency motion for a stay pending appeal. That motion was denied by the court of appeals on the same day. See Pet. Br. 8.

controversy therefore exists (Pet. App. 2a, citing *United States* v. *Kersting*, 891 F.2d 1407 (9th Cir. 1989), cert. denied, 111 S. Ct. 49 (1990)).

SUMMARY OF ARGUMENT

Since the documents requested by the IRS summons have been produced, petitioner's continued opposition to enforcement of the summons is moot. The "case" or "controversy" required to support the exercise of jurisdiction by an Article III court "must concern the subject matter of the action" over which the court has subject matter jurisdiction. *United States* v. *Kis*, 658 F.2d 526, 533 (7th Cir. 1981), cert. denied, 455 U.S. 1018 (1982). The subject matter of a summons enforcement action, and the subject matter jurisdiction of the federal courts under 26 U.S.C. 7402(b), 7604(a), is limited to determining whether "to compel * * * production" of the requested information (*ibid.*). Once production has occurred, the only issue for which subject matter jurisdiction exists under the statute—whether production should be *compelled*—has become moot. This conclusion is equally true whether production is made directly by the taxpayer or by any third party to whom the summons is addressed.

Petitioner's additional argument that the government should not be permitted continued "use of" (Pet. Br. 13) the copies of the documents produced pursuant to the summons (or of information derived therefrom) also fails to present a justiciable claim. Such a claim "obviously is premature and may be considered if and when proceedings arise in which the Government seeks to use the documents or information obtained from them" (*G.M. Leasing Corp.* v. *United States*, 429 U.S. 338, 359 (1977)).

ARGUMENT

WHETHER THE SUMMONS SHOULD BE ENFORCED IS A MOOT QUESTION

Under Article III, Section 2 of the Constitution of the United States, the judicial power of the United States extends only to "cases" and "controversies." It is the duty of the court "to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Mills* v. *Green*, 159 U.S. 651, 653 (1895). See *Preiser* v. *Newkirk*, 422 U.S. 395, 401 (1975); *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971). The "actual controversy" must exist "at all stages of review, not merely at the time the complaint is filed." *Preiser* v. *Newkirk*, 422 U.S. at 401; *Steffel* v. *Thompson*, 415 U.S. 452, 459 n.10 (1974). A case that presented a live controversy when the complaint was filed may become moot prior to entry of the district court's decision or on appeal or after a petition for a writ of certiorari has been filed. *DeFunis* v. *Odegaard*, 416 U.S. 312, 316-320 (1974). A case that has become moot does not present an Article III "case" or "controversy" and must therefore be dismissed. See *Aetna Life Insurance Co.* v. *Haworth*, 300 U.S. 227, 228-229 (1937); *Brownlow* v. *Schwartz*, 261 U.S. 216, 217-218 (1923); *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472 (1990). See also 13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3533.1, at 218-219 (2d ed. 1984).

In the present case, the court of appeals held that the MCCS tapes were within the scope of the crime-fraud exception and should be produced by the Clerk

of the Superior Court pursuant to the summons (Pet. App. 15a).[10] That order was complied with by the Clerk of the Superior Court, after the courts below and this Court denied petitioner's numerous stay motions. Since copies of the MCCS tapes have now been produced to the IRS pursuant to the summons, there

[10] This case comes before the Court in what fairly may be described as an unusual procedural context. The question that petitioner seeks to litigate—whether the documents requested in the IRS summons should be produced—has been fully adjudicated and finally decided adversely to petitioner. *United States* v. *Zolin*, 905 F. 2d 1344 (9th Cir. 1990), cert. denied, 111 S. Ct. 1309 (1991). To implement, or execute, that final judgment, the United States applied to the district court for an order directing production of the requested documents. The district court issued the requested order, noting that "[l]itigation must end sometime" (Pet. App. 6a) and that the court's authority was limited to enforcing, not relitigating, the judgment entered by the court of appeals (*ibid.*).

Petitioner nonetheless appealed the order entered by the district court, again seeking to relitigate the merits of the judgment previously entered by the court of appeals. The court of appeals declined to consider the appeal, noting that the documents at issue had been produced pursuant to the district court's order and that petitioner's renewed challenge to the validity of the summons was therefore moot.

Petitioner's unceasing efforts to relitigate matters finally determined against it were properly rejected by the district court. The courts, as well as petitioner, are bound by the prior, final judgment in *United States* v. *Zolin*, 905 F.2d at 1344. Precisely because "[l]itigation must end sometime" (Pet. App. 6a), this conclusion is true even if, as petitioner erroneously continues to claim, the challenged judgment is not "free from error" (1B *Moore's Federal Practice* ¶ 0.405[4.-1], at 197-198 (2d ed. 1992); see also *United States* v. *Throckmorton*, 98 U.S. 61 (1878)). These peculiar, independent obstacles to petitioner's contentions were brought to the Court's attention in our brief in opposition to certiorari in this case (at 4-5, 13-14). See this Court's Rule 15.1.

is no continuing, live controversy with respect to whether the summons may be enforced. Because that was the only issue the federal courts had jurisdiction to determine in the summons enforcement proceedings under 26 U.S.C. 7426(b), 7604(a), any further opinion that the court might render in this case would be advisory in nature. The court of appeals therefore properly dismissed the appeal as moot.

A. The Jurisdiction Of The Federal Courts In An IRS Summons Enforcement Case Is Limited To Determining Whether To Compel Production Of The Information Requested By The Summons

Because "[f]ederal courts are without power to decide questions that cannot affect the rights of litigants in the case before them" (*North Carolina* v. *Rice*, 404 U.S. at 246), the case or controversy that must exist to support Article III jurisdiction "cannot be just any dispute between the parties but must concern the subject matter of the action." *United States* v. *Kis*, 658 F.2d at 533. The jurisdiction of the federal district courts is derived "wholly from the authority of Congress." *Kline* v. *Burke Construction Co.*, 260 U.S. 226, 234 (1922). The district courts therefore lack power to decide questions that are unrelated to the subject matter of the action upon which their jurisdiction is founded. *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941). This is especially so in cases involving the United States. The "United States, as sovereign, is immune from suit save as it consents to be sued" (*ibid.*), and "the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *Ibid.*

The subject matter of the summons enforcement action, and the subject matter jurisdiction of the federal courts under 26 U.S.C. 7402(b), 7604(a), is

limited to determining whether "to compel * * * production" of the requested information (*ibid.*). Once, as here, production has occurred, the only issue for which subject matter jurisdiction exists under the statute—whether production should be compelled—has become moot. *United States* v. *Kis*, 658 F.2d at 532-535. For this reason, courts routinely have "held that compliance with an IRS summons moots an appeal of the enforceability of the summons." *Id.* at 532 & n.10 (citing, *e.g.*, *United States* v. *Arthur Andersen & Co.*, 623 F.2d 720 (1st Cir.), cert. denied, 449 U.S. 1021 (1980); *United States* v. *Deak-Perera International Banking Corp.*, 610 F.2d 89 (2d Cir. 1979); *Vesco* v. *SEC*, 462 F.2d 1350 (3d Cir. 1972); *Kurshan* v. *Riley*, 484 F.2d 952 (4th Cir. 1973); *Lawhon* v. *United States*, 390 F.2d 663 (5th Cir. 1968); *United States* v. *Patmon*, 630 F.2d 458 (6th Cir. 1980); *United States* v. *Olson*, 604 F.2d 29 (8th Cir. 1979)).[11]

[11] "Every circuit that has considered this question, except the Third Circuit, see *Gluck* v. *United States*, 771 F.2d 750, 754 (3d Cir. 1985), has held that compliance with an IRS summons moots an appeal of the enforceability of the summons." *United States* v. *Kersting*, 891 F.2d at 1410 n.8. See, *e.g.*, *Hintze* v. *IRS*, 879 F.2d 121, 124-125 (4th Cir. 1989); *United States* v. *Church of World Peace*, 878 F.2d 1281 (10th Cir. 1989); *United States* v. *Sherlock*, 756 F.2d 1145, 1146-1147 (5th Cir. 1985); *United States* v. *First Family Mortgage Corp.*, 739 F.2d 1275, 1278-1279 (7th Cir. 1984); *United States* v. *Kis*, 658 F.2d 526, 533 (7th Cir. 1981), cert. denied, 455 U.S. 1018 (1982); *United States* v. *Equity Farmers Elevators*, 652 F.2d 752 (8th Cir. 1981); *United States* v. *Silva & Silva Accountancy Corp.*, 641 F.2d 710, 711 (9th Cir. 1981); *United States* v. *Deak-Perera International Banking Corp.*, 610 F.2d 89 (2d Cir. 979); *Kursham* v. *Riley*, 484 F.2d 952 (4th Cir. 1973); *United States* v. *Lyons*, 442 F.2d 1144, 1145 (1st Cir. 1971). See also 13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure*, § 3533.2, at 246 n.35 (2d ed. 1984 & Supp. 1992).

1. Congress has conferred authority upon the Secretary of the Treasury to make accurate determinations of tax liability and has granted him broad authority to conduct investigations for that purpose. As the Secretary's delegate, the Commissioner of Internal Revenue is charged with the duty to make inquiries, determinations and assessments of all taxes imposed by the Internal Revenue Code. See 26 U.S.C. 7601-7603; *Donaldson* v. *United States*, 400 U.S. 517, 523-524 (1971); *United States* v. *McAnlis*, 721 F.2d 334, 336 (11th Cir. 1983), cert. denied, 467 U.S. 1227 (1984).

The summons power is the means provided by Congress to enable the Commissioner to discharge this investigative responsibility. Section 7602 of the Code authorizes the Commissioner, "[f]or the purpose of ascertaining the correctness of any return, making a return where none have been made, [or] determining the liability of any person for any internal revenue tax, * * * [t]o examine any books, papers, records or other data which may be relevant or material to such inquiry" and to summon any person to appear and produce such documents and to give relevant testimony. 26 U.S.C. 7602.[12] Section 7602 pro-

[12] The proper limits of the district court's inquiry in a summons enforcement proceeding were delineated in *United States* v. *Powell*, 379 U.S. 48, 57-59 (1964). To obtain enforcement, the government need only show that "the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed." *Id.* at 57-58. The Court added that this does not mean that the district court cannot make any inquiry at all into the underlying reasons for the summons, stating that "a court may not permit its process to be abused." *Id.* at 58. "Such an abuse would take place if the

vides the IRS with expansive information-gathering authority so that effective tax investigations may be conducted. See *United States* v. *Arthur Young & Co.*, 465 U.S. 805, 813-815 (1984); *United States* v. *Euge*, 444 U.S. 707, 714-717 (1980); *United States* v. *Saunders*, 951 F.2d 1065, 1067 (9th Cir. 1991); *Hintze* v. *IRS*, 879 F.2d 121, 125 (4th Cir. 1989).[13]

2. As is ordinarily the case when administrative agencies are granted subpoena power, the IRS lacks authority to compel obedience to its orders by means of contempt or other sanctions. See *Reisman* v. *Caplin*, 375 U.S. 440, 445-446 (1964). If the summoned party refuses to produce the requested documents, the IRS must seek judicial enforcement of the summons. Sections 7402(b) and 7604(a) of the Code confer a limited jurisdiction on the federal district courts for this purpose. These statutes provide (26 U.S.C. 7402(b), 7604(a)) (emphasis added):

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summons had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose of reflecting on the good faith of the particular investigation." *Ibid.* The burden of showing such an abuse, however, is on the party challenging enforcement. *Ibid.* Under the framework established in *Powell*, a summons is to be enforced if issued in "good faith" in furtherance of a legitimate purpose for which the use of the summons authority has been authorized by Congress. See also *United States* v. *Stuart*, 489 U.S. 353, 370 (1989); *United States* v. *Bisceglia*, 420 U.S. 141, 145-146 (1975); *Donaldson* v. *United States*, 400 U.S. at 526-527; *United States* v. *Kis*, 658 F. 2d at 535-536.

[13] This Court has described Section 7602 as the "centerpiece" of the statutory scheme endowing the IRS with expansive authority to conduct effective tax investigations. *United States* v. *Arthur Young & Co.*, 465 U.S. at 816. See also *Holifield* v. *United States*, 909 F. 2d 201, 205 (7th Cir. 1990).

> If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, [records,] or other data, *the district court* of the United States for the district in which such person resides or may be found *shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, [records,] or other data.*[14]

The jurisdiction conferred by Sections 7402(b) and 7604(a) is expressly limited to entering an order directing the summoned party to comply with the summons in whole or in part, or denying enforcement. *United States* v. *First National State Bank*, 540 F.2d 619, 625 (3d Cir. 1976). The sole purpose of the summons enforcement proceeding is to determine whether the government is entitled to peremptory process to obtain information for its investigation. Only matters bearing upon that question are within the narrow jurisdiction thus provided. Federal courts therefore lack jurisdiction in a summons enforcement action to decide questions unrelated to whether peremptory process should be issued. See, *e.g.*, *Reisman* v. *Caplin*, 375 U.S. at 441-443 (complaint seeking to declare IRS summons null and void dismissed for want of equity); *United States* v. *Abrahams*, 905 F.2d 1276, 1286-1287 (9th Cir. 1990) (court lacks jurisdiction in summons enforcement case to enjoin IRS from interviewing attorney's clients); *United States* v. *Barrett*, 837 F.2d 1341, 1350 (5th Cir. 1988) (en banc), cert. denied, 492 U.S. 926 (1989) ("In a summons enforcement proceeding, the district court's only task is to determine whether the summons should or should not be en-

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[14] The word "records" appears in Section 7604(a) but not in Section 7402(b). See 26 U.S.C. 7402(b), 7604(a).

forced."); *United States* v. *First Family Mortgage Corp.*, 739 F.2d 1275 (7th Cir. 1984) (taxpayer not entitled to injunction to restrain IRS use of documents produced in summons enforcement case); *United States* v. *Kis*, 658 F.2d 526, 533 (7th Cir. 1981), cert. denied, 455 U.S. 1018 (1982) (post-enforcement suppression remedies are not proper in IRS summons cases).

The district court's jurisdiction in a summons enforcement proceeding does not include authority to supervise the summoned material once it has been supplied to the IRS.[15] The court's authority is, in-

[15] The district court's limited jurisdiction under 26 U.S.C. 7402(b), 7604(a), is emphasized by the Tax Anti-Injunction Act, 26 U.S.C. 7421(a). That statute withdraws jurisdiction from the federal courts over suits brought for the "purpose of restraining the assessment or collection of any tax." *Ibid.* This restriction on jurisdiction is "equally applicable to activities leading up to, and culminating in, such assessment and collection" (*Lowrie* v. *United States*, 824 F.2d 827, 830 (10th Cir. 1987)), such as IRS investigative activity. See, *e.g.*, *Zimmer* v. *Connett*, 640 F.2d 208, 210 (9th Cir. 1981) (Tax Anti-Injunction Act prohibits enjoining IRS inspection of taxpayers' books and records); *Koin* v. *Coyle*, 402 F.2d 468, 469 (7th Cir. 1968) (Act bars suit to enjoin IRS from using evidence to make tax assessments); *Black* v. *United States*, 534 F.2d 524, 527 (2d Cir. 1976).

In *United States* v. *First Family Mortgage Corp.*, 739 F.2d 1275, 1278 (7th Cir. 1984), the court of appeals rejected a taxpayer's request to enjoin the IRS from using materials produced pursuant to a summons, noting that the Tax Anti-Injunction Act bars a taxpayer from "seeking to enjoin the IRS from acquiring or using the information necessary * * * to determine a proper tax assessment." The court stated that "[a]bsent a clear indication allowing remedial powers for the court once the IRS obtain summoned documents," the Tax Anti-Injunction Act deprives the court of jurisdiction "to stop the IRS from using those documents." *Id.* at 1278-1279.

stead, to determine whether the taxpayer's objections to the summons are valid. If the objections are not valid, the court may exercise its "jurisdiction * * * to compel * * * production of" the information requested by the summons. 26 U.S.C. 7402(b), 7604(a). If the taxpayer's objections are valid, the court is then *not* "to compel * * * production" (*ibid.*).

Once compliance has occurred, the summons process is over. Compliance quite obviously renders moot the question whether to issue peremptory process to enforce the summons.[16] Since the case or controversy required to support the exercise of federal jurisdiction cannot be just *any* dispute between the parties, but must "concern the subject matter of the action" for which jurisdiction has been conferred (*United States* v. *Kis*, 658 F.2d at 533), compliance with the summons deprives the courts of any further jurisdiction. The summons enforcement case is moot, and no other basis for subject matter jurisdiction exists in that proceeding. See note 15, *supra*. For this reason, the court of appeals correctly held that the "case" or "controversy" requirement of Article III is no longer satisfied once compliance with the summons has occurred. See, *e.g.*, *United States* v. *Kersting*, 891 F.2d at 1410 n.8; *United States* v. *Sherlock*, 756 F.2d at

[16] A summons enforcement case is not a final adjudication on the merits of a taxpayer's liabilities. *United States* v. *Barrett*, 837 F.2d at 1349. See also *United States* v. *Harper*, 662 F.2d 335, 336 (5th Cir. 1981). Cf. *FTC* v. *Standard Oil Co.*, 449 U.S. 232 (1980). It is a proceeding ancillary to the duty of the Secretary of the Treasury "to proceed, from time to time, through each internal revenue district and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax." 26 U.S.C. 7601(a). The summons authority contained in Section 7602 of the Code enables the Secretary to carry out this function.

1146-1147; *United States* v. *Kis*, 658 F.2d at 533; cases cited page 12 & note 11, *supra*.

B. The Claim That The United States Should Be Enjoined From Further Use Of The Documents Produced Pursuant to the Summons Is Not Justiciable

Petitioner contends that this case is not moot even *after* compliance with the summons because the district court could enter an order directing the Internal Revenue Service to cease "use of" (Pet. Br. 13) the information that has been produced.[17] That claim, however, is not justiciable.

This Court has frequently had occasion to consider whether the United States may be ordered to cease use of information obtained through its investigative activities. When such claims are raised in advance of trials or other adjudicative proceedings designed to enforce substantive liabilities, the Court has consistently concluded that a request to enjoin government use of information "obviously is premature" (*G.M. Leasing Corp.* v. *United States*, 429 U.S. 338, 359 (1977)). A request to enjoin the government from using information obtained through investigative processes may be considered only "if and when proceedings arise in which the Government seeks to use the documents or information." *Ibid.* To the extent the taxpayer possesses a valid right to seek suppression of the documents (or of any information derived from them), he may assert that claim "in due course at its proper place in any subsequent trial." *Donald-*

[17] For the reasons explained in note 10, *supra*, the underlying premise of petitioner's argument—that the district court could reverse the prior final, nonappealable judgment of the court of appeals ordering enforcement of the summons (see note 8, *supra*)—lacks any basis in this case.

son v. *United States*, 400 U.S. at 531. See also *United States* v. *Blue*, 384 U.S. 251, 255 (1966) ("Even if we assume that the Government did acquire incriminating evidence in violation of the Fifth Amendment, Blue would at most be entitled to suppress the evidence and its fruits if they were sought to be used against him at trial.").

It is settled beyond peradventure that Article III of the Constitution does not allow federal courts to rule upon hypothetical controversies involving purely speculative future events. *Muskrat* v. *United States*, 210 U.S. 346 (1911). As the Seventh Circuit held in *United States* v. *Kis*, 658 F.2d at 533, "[i]t would be highly speculative" to rule on the legality of an IRS summons *after* compliance "for there is no guarantee that the Government will ever seek to use the summoned evidence." *Ibid.* Petitioner's request to bar the government from future use of information produced pursuant to the summons therefore "should not be considered until the time when the Government seeks to use that evidence." *United States* v. *Kis*, 658 F.2d at 533.[18] There is "no need, nor would it be proper, to decide that question now." *Ibid.*

The potential, future controversy that may arise concerning proper uses of the summoned information is, at present, merely hypothetical. Petitioner's suggestion (Pet. Br. 13) that the United States should be prohibited from using that information in the future therefore does not present a justiciable ques-

[18] The court of appeals has already finally adjudicated the merits of the crime-fraud issue and has determined that the documents are properly subject to the summons. See note 8, *supra*. It is thus particularly speculative in this case to claim that additional rulings will be required to resolve this issue in the future. See note 10, *supra*.

tion. See *United States* v. *Kersting*, 891 F.2d at 1411; *Hintze* v. *IRS*, 879 F.2d 121, 125 (4th Cir. 1989); *United States* v. *Sherlock*, 756 F.2d 1145, 1147 (5th Cir. 1985); *SEC* v. *Laird*, 598 F.2d 1162, 1163 (9th Cir. 1979) ("Appellants may adequately protect their asserted interests by seeking to suppress such [previously subpoenaed and produced] information in any subsequent proceeding.").[19] See also *Donaldson* v. *United States*, 400 U.S. at 531; *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950); *United States* v. *First American Bank*, 649 F.2d 288, 289 n.3 (5th Cir. 1981); *United States* v. *Lyons*, 442 F.2d 1144, 1145 (1st Cir. 1971).

IRS summons enforcement proceedings are designed to be "summary" in character. *Donaldson* v. *United States*, 400 U.S. at 529. "The enforcement proceeding should be concluded expeditiously so that the actual investigation can be continued with the goal of reaching the final determination of whether there will be any civil or criminal liability for the taxpayer."

[19] Dismissal of an appeal as moot does not jeopardize an appellant's substantive rights: after an appeal is dismissed as moot, the order appealed from is to be vacated by the district court (because that order became moot before it became final). This procedure is followed "to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences," *United States* v. *Munsingwear, Inc.*, 340 U.S. at 41, and "clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance" (*id.* at 40). See also *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975). This procedure leaves the affected parties with the ability to challenge the introduction of materials produced in compliance with the enforcement order at any subsequent proceeding, either civil or criminal. *Donaldson* v. *United States*, 400 U.S. at 531; *United States* v. *Munsingwear*, 340 U.S. at 39-41. But see note 10, *supra*.

United States v. *Barrett*, 837 F.2d at 1349.[20] Post-enforcement proceedings involving suppression of summoned records conflict with, and burden, the "summary" summons enforcement scheme Congress provided.[21] Such proceedings would also afford an opportunity for the summoned party to subject IRS tax investigations to repeated scrutiny and harassment.

As this case reveals with painful clarity, litigation over IRS summonses often entails a prolonged struggle between the government's attempts, in a timely fashion, to obtain information necessary to its investigations and taxpayers' attempts to delay those investigations. Allowing taxpayers to employ the forum of a summons enforcement proceeding to litigate suppression questions in advance of trial would lead to the courts' repeated involvement in IRS investigations. That further burden upon summons litigation would threaten to create harmful delays in tax investigations. Congress did not authorize the creation of such delays by providing jurisdiction to the district courts "to compel * * * production" of docu-

[20] For example, in *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978), the Court rejected the contention that the motives of the IRS agent who caused the summons to be issued could be inquired into as part of the summons enforcement proceeding under 26 U.S.C. 7402(b), 7604(a). The Court expressed concern that such extraneous inquiries would unduly delay the summary proceeding envisioned by the statute. 437 U.S. at 316.

[21] This Court has emphasized on several occasions that the summons power is a broad one and that "restrictions upon the IRS summons power should be avoided 'absent unambiguous directions from Congress'." *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 318 (1985); *United States* v. *Arthur Young & Co.*, 465 U.S. at 816; *United States* v. *Bisceglia*, 420 U.S. at 150.

ments requested in an IRS summons (26 U.S.C. 7402(b), 7602(a)).

A rule permitting district courts to extend their jurisdiction in summons enforcement actions to post-enforcement supervision over the IRS's use of the summoned material would " 'stultify' and unduly delay the investigation" into taxpayer compliance with the internal revenue laws (*United States* v. *Ernst & Whinney*, 750 F.2d 516, 520 (6th Cir. 1984) (quoting *Donaldson* v. *United States*, 400 U.S. at 531)). It would also require federal courts to issue advisory opinions on hypothetical controversies. Since the federal judiciary lacks jurisdiction under Article III to issue advisory opinions, the court of appeals correctly dismissed the appeal in this case as moot.

C. The Cases Upon Which Petitioner Relies Do Not Support The Proposition That This Case Is Not Moot

1. As the Ninth Circuit correctly observed in *United States* v. *Kersting*, "[e]very circuit that has considered this question, except the Third Circuit, see *Gluck* v. *United States*, 771 F.2d 750, 754 (3d Cir. 1985), has held that compliance with an IRS summons moots an appeal of the enforceability of the summons." 891 F.2d at 1410 n.8. Petitioner's reliance (Pet. Br. 17) on the singular decision of the Third Circuit in *Gluck* is unavailing.

The panel majority in *Gluck* held that "the surrendering of the documents to the IRS does not end the controversy." 771 F.2d at 754. The court based that holding on the rejected theory that the federal courts retain jurisdiction *after* compliance to prohibit the government's "use of the summoned documents." *Ibid.* As Judge Garth stated in dissent in *Gluck*, the court should not (*id.* at 759)

> rely upon the completely speculative possibility that future criminal or civil proceedings may be instituted against the [taxpayers] to endow their present appeal with a vitality it no longer possesses. Should the government initiate any subsequent proceedings against the [taxpayers, they] may move to suppress the use of any information which was obtained by the government as a result of compliance with the summonses. *See, e.g., G.M. Leasing Corp.* v. *United States*, 429 U.S. 338, 359 (1977); *Donaldson* v. *United States*, 400 U.S. 517, 531 (1971).

Gluck stands alone in suggesting that 26 U.S.C. 7402(b) and 7604(a) confer jurisdiction on the courts to render advisory opinions on the proper future use of summoned information. See 771 F.2d at 760 (Garth, J., dissenting). *Gluck* is also inconsistent with the Third Circuit's own prior decision in *Vesco* v. *SEC*, which held that compliance with an SEC subpoena "obviated the 'case or controversy' originally surrounding the subpoena" (462 F.2d at 1351) and therefore required dismissal of the appeal from the order enforcing the subpoena as moot (*ibid.*). See 771 F.2d at 759 (Garth, J., dissenting).

Gluck is thus isolated—in a minority of one—on the issue addressed in this case. Petitioner seriously misstates the law in implying that *Gluck* is an "example" of the decisions of "numerous courts" (Pet. Br. 16, 17) holding that compliance with a summons does not moot the summons enforcement proceedings.[22]

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[22] Petitioner offers *Cardwell* v. *Kurtz*, 765 F.2d 776 (9th Cir. 1985), as one other "example" of its proposition (Pet. Br. 18). The *Cardwell* case did not involve an IRS summons; nor did it involve the limited jurisdiction of the district courts "to compel * * * production" (26 U.S.C. 7402(b), 7604(a)) of documents pursuant to such a summons. Instead, *Cardwell*

"Numerous courts" have, instead, held quite clearly to the contrary. See *United States* v. *Kersting*, 891 F.2d at 1410 n.8 (citing cases).

2. Petitioner also errs in relying (Pet. Br. 18-21) on *United States* v. *Sells Engineering, Inc.*, 463 U.S. 418 (1983), and *In re Grand Jury Subpoena Dated June 5, 1985 (Doe)*, 825 F.2d 231 (9th Cir. 1987). Those cases involve the supervisory authority of federal courts to restrain continuing violations of grand jury secrecy; they do not concern the limited jurisdiction provided by 26 U.S.C. 7402(b), 7604(a), to "compel * * * production" of documents requested in an IRS summons.

Rule 6(e) of the Federal Rules of Criminal Procedure codifies the traditional rule of grand jury secrecy. In *Sells Engineering*, this Court held that an appeal involving allegations of continuing, new improper disclosures of grand jury materials was not moot because prospective relief preventing such improper future disclosures could be granted. 463 U.S. at 422 n.6 (quoting *In re Grand Jury Investigation No. 78-184 (Sells, Inc.)*, 642 F.2d 1184, 1187-1188 (9th Cir. 1981)). In *Sells*, the court of appeals had ordered such prospective relief as "a proper means to prevent further disclosure before it occur[red]." 642 F.2d at 1188. At the same time, however, the court of appeals recognized that "the availability

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involved a claim that IRS agents had obtained documents from a business *without* a summons or other lawful process by engaging in "fraud, deceit and trickery" (765 F.2d at 778). In concluding that suit for recovery of documents obtained by fraud could proceed, the court of appeals did not purport to—and did not—alter the established rule of that circuit that "compliance with an IRS summons moots an appeal of the enforceability of the summons" (*United States* v. *Kersting*, 891 F.2d at 1410 n.8).

of a motion to suppress in future proceedings provides a remedy for improper disclosures that have already occurred. *Ibid.*

There is no doubt that district courts have inherent power to supervise grand juries and enforce "legally compelled standards of prosecutorial conduct" (*United States* v. *Williams*, No. 90-1972 (May 4, 1992), slip op. 10).[23] The grand jury is an arm of the court itself. Requiring offending officials to prevent continuing violations of grand jury secrecy is necessary to preserve the integrity of the court and the criminal justice process. Absent allegations of improper *future* disclosures to persons not authorized to review the grand jury materials, however, disclosure to authorized persons moots the controversy concerning the propriety of past disclosures. See *In re Federal Grand Jury Investigation (McElroy)*, 718 F.2d 875, 876 (8th Cir. 1983); *In re Corrugated Container Grand Jury*, 659 F.2d 1330 (5th Cir. 1981), cert. denied, 456 U.S. 937 (1982). For past disclosures, a motion in future civil or criminal proceedings to suppress use of unlawfully obtained evidence is the

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[23] Some courts have held that there is an inherent, "anomalous" jurisdiction over constitutional claims under 28 U.S.C. 1331 to prevent or remedy illegal acts by federal agents. See, *e.g.*, *Linn* v. *Chivatero*, 714 F.2d 1278 (5th Cir. 1983); *Hunsucker* v. *Phinney*, 497 F.2d 29 (5th Cir. 1974). Contrary to petitioner's contentions (Br. 24), however, to the extent "anomalous" jurisdiction exists at all, it does not exist unless the facts demonstrate a callous disregard of the taxpayer's *constitutional rights* for which equitable relief is appropriate. There has been no suggestion, much less any showing, of a constitutional violation in this case. Nor have the cases involving "anomalous" jurisdiction suggested that this theory provides a jurisdictional basis for ordering the return of records obtained by the IRS pursuant to a summons enforcement order.

proper remedy for improper grand jury disclosures. *In re Grand Jury Investigation No. 78-184 (Sells, Inc.)*, 642 F.2d at 1188.[24]

The IRS is a separate federal agency, not an arm of the federal courts. Unlike cases involving breaches of grand jury secrecy, IRS investigations are not subject to continuing supervision by the district courts. See note 15, *supra*. And, unlike the situation in *Sells*, there are no allegations in this case that continuing, improper disclosures of confidential information to unauthorized persons are occurring. To the contrary, the disclosure involved in this case was made pursuant to an order restricting the IRS from disclosing the materials to other agencies. See note 4, *supra*. See also 26 U.S.C. 6103 (restricting IRS disclosure of taxpayer return information). The availability of a motion to suppress in future civil proceedings provides an appropriate remedy for any alleged improper *past* disclosure by the Service of the summoned information. *United States* v. *Kis*, 658 F.2d at 533; *In re Grand Jury Investigation No. 78-174 (Sells, Inc.)*, 642 F.2d at 1188.

Unlike *Sells*, there is no suggestion in this case that improper, future disclosures to unauthorized persons will occur. Any issue relating to the IRS's future use of the summoned materials "obviously is premature" (*G.M. Leasing Corp.* v. *United States*, 429 U.S. at 359) and does not directly bear on the district court's narrow summons enforcement jurisdiction. The speculative possibility that a future controversy may arise concerning future disclosures *by* the IRS

[24] Cf. *McQueen* v. *Bullock*, 907 F.2d 1544, 1551 (5th Cir. 1990) (taxpayer's action against United States for alleged violations of grand jury secrecy barred by sovereign immunity).

cannot serve as a basis for continuing jurisdiction over a case that concerns the moot question whether disclosures are to be made *to* the IRS.

3. Decisions involving Federal Trade Commission subpoenas, on which petitioner erroneously relies (Pet. Br. 22-23), are consistent with the conclusion that compliance with an IRS summons moots an appeal from an order enforcing the summons. Those cases, such as *FTC* v. *Gibson Products of San Antonio, Inc.*, 569 F.2d 900 (5th Cir. 1978), are distinguishable. They concern appeals from orders enforcing FTC subpoenas issued during the course of ongoing adjudicative proceedings. In *Gibson Products*, the court of appeals held that the challenge to the subpoenas was not moot, despite compliance with them, because the court could enter "an order requiring the FTC to return the subpoenaed documents and *to forbid use of the material in the adjudicatory hearing*." *Id.* at 903 (emphasis added). The subpoenas at issue in *Gibson Products* were adjudicative subpoenas, issued for discovery purposes in a case then pending before the FTC.[25] Reversal of the order enforcing the adjud-

[25] The court of appeals emphasized in *Gibson Products* that "these are adjudicative subpoenas issued after the filing of the complaint, and not investigative subpoenas." 569 F. 2d at 904.

In the recent decision of the District of Columbia Circuit in *FTC* v. *Invention Submission Corp.*, No. 91-5174 (June 2, 1992), the court did not consider this distinction in concluding that compliance with an FTC *investigative* subpoena "does not moot the controversy." Slip op. 4 n.1. The *Invention Submission* court had no reason to consider *Gibson Products*, and addressed the mootness issue only in a brief footnote, because the parties did not contend that the *Gibson Products* distinction was applicable to that case (see *ibid.*). Instead, in *Invention Submission*, the court cited *Office of*

icative subpoena not only divested the FTC of the documents, but prevented their use in the then-ongoing proceeding.[26]

Thrift Supervision v. *Dobbs*, 931 F.2d 956 (D.C. Cir. 1991), as support for the statement that compliance with an investigative subpoena does not moot the enforcement case. Slip op. 4 n.1.

In *Office of Thrift Supervision* v. *Dobbs*, however, the court held that compliance with an investigative subpoena *does* moot the enforcement case (931 F.2d at 957-958) and that "concern about future government action that may never even occur is insufficient to create a concrete present controversy." *Id.* at 958. The court noted in *Dobbs* that the subpoenaed party had not requested return of the "documents he provided" and that questions concerning who should be given "custody" of the documents were therefore not presented in that case (*ibid.*). The court stated in dicta, however, that *Gibson Products* indicates that a claim seeking to enjoin further *use* of the documents by the government would not be sufficient to keep the enforcement action alive in the context of an investigative, rather than adjudicative, subpoena. *Ibid.* While noting that the Third Circuit's decision in *Gluck* pointed the other way, the court suggested that *Gluck* was not correctly decided. See 931 F.2d at 959.

[26] These decisions involving FTC adjudicative subpoenas all antedate this Court's decision in *FTC* v. *Standard Oil Co.*, 449 U.S. 232 (1980), holding that the FTC's issuance of a complaint did not constitute final agency action reviewable before the conclusion of the administrative adjudication. The rationale of the *Standard Oil* decision casts doubt on whether the admissibility of information obtained through FTC adjudicative subpoenas should be addressed in the subpoena enforcement proceedings. That, however, is because of the Court's interpretation of the finality requirement of the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, not the constitutional case or controversy requirement. Because the IRS summons authority under 26 U.S.C. 7602(a)(1) expressly extends to any materials that "may be relevant" to the tax investigation, the question of admissibility *vel non* of particular materials in a possible future adjudicative proceeding is obviously not germane in an IRS summons enforcement proceeding.

A decision on the merits of the appeal in cases such as *Gibson Products* affects the rights of parties with regard to the availability and admissibility of evidence in then-pending adjudicative proceedings before the FTC. By contrast, a decision on the merits of petitioner's appeal in this IRS summons enforcement case would not affect the rights of the parties in any ongoing adjudicative proceeding. Indeed, nothing but speculation suggests that there will ever be an adjudicative proceeding at which the United States will seek to use the summoned materials or offer them into evidence. If such an adjudicative proceeding hereafter occurs, the affected parties will then be free at that time to challenge the introduction of the material. See *United States* v. *Kis*, 658 F.2d at 533.[27]

D. The Fact That The Summons Was Issued To And Complied With By A Party Other Than The Taxpayer Does Not Make This Moot Case Justiciable

Petitioner contends (Pet. Br. 25-30) that the fact that the summons was issued to, and the documents

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[27] *Casey* v. *FTC*, 578 F.2d 793 (9th Cir. 1978), on which petitioner relies (Pet. Br. 23), is inapposite. In *Casey*, the Ninth Circuit held that compliance with an FTC subpoena had not mooted an appeal even though the appellant had produced all of the requested documents. In so ruling, the court of appeals emphasized that, since the documents had not been verified, as required by the subpoena, full compliance had not occurred and the controversy was therefore still live. 578 F.2d at 798. In *Casey*, the Ninth Circuit did not purport to—and did not—reject the established rule of that circuit that compliance with an IRS summons makes an appeal from an order enforcing the summons moot. See *United States* v. *Kersting*, 891 F.2d at 1410-1411.

were surrendered by, a third party, rather than petitioner, prevents this case from being moot. That difference in the method of compliance does not create a distinction for the purpose of the constitutional case or controversy requirement.

Contrary to petitioner's contentions, the many decisions holding that compliance with an IRS summons renders moot further litigation concerning enforcement of the summons are not limited to situations where a taxpayer, as distinguished from a disinterested third party, complies with the summons. See, *e.g.*, *United States* v. *Silva & Silva Accountancy Corp.*, 641 F.2d 710, 711 (9th Cir. 1981) (taxpayer's appeal of order enforcing IRS summons mooted by accountant's compliance with summons); *Hintze* v. *IRS*, 879 F.2d at 124-125 (third-party's compliance with IRS summons enforcement order precludes exercise of appellate jurisdiction); *United States* v. *First American Bank*, 649 F.2d 288, 289 (5th Cir. 1981) (same); *United States* v. *Deak-Perera International Banking Corp.*, 610 F.2d 89 (2d Cir. 1979) (same). Those decisions rest on the same rationale underlying this Court's holding in *Donaldson* v. *United States*, 400 U.S. at 531, that the taxpayer lacks sufficient interest to be allowed to intervene in a summons enforcement proceeding seeking records from a third party because the taxpayer's claims may be made "in due course * * * in any subsequent trial." [28]

The two allegedly conflicting cases on which petitioner purports to rely (Pet. 27-28, citing *United States* v. *Arthur Andersen & Co.*, 623 F.2d 720, 724

[28] Congress subsequently enacted 26 U.S.C. 7609, conferring a right on taxpayers to intervene in summons enforcement proceedings involving certain, but not all, categories of third parties. See 26 U.S.C. 7609(a)(3).

(1st Cir.), cert. denied, 449 U.S. 1021 (1980); *United States* v. *Kersting*, 891 F.2d at 1411 n.9) do not support the conclusion that compliance with a summons by a disinterested third party does not moot an appeal. In *Arthur Andersen & Co.*, the court of appeals held that an appeal from a summons enforcement order by an accounting firm that was not the target of the investigation was rendered moot by its compliance with the summons. In so holding, the court rejected the accountants' contention that their appeal fell within the category of cases excepted from mootness on the theory that they are "capable of repetition yet evading review." 623 F.2d at 723. As the court observed, as is the case with a party that is itself the target of a tax investigation, a third party "can refuse to comply and litigate the merits of the summons as a defense to a contempt citation." *Ibid.*[29] And, in *United States* v. *Kersting*, *supra*, the court simply observed that it did not have a "disinterested third party" before it and thus expressed no opinion as to whether that would have any bearing on its analysis. 891 F.2d at 1411 n.9. Nothing in *Arthur Andersen & Co.* or *Kersting* supports petitioner's claim that an appeal is not moot when a party other than the taxpayer complies with an IRS summons.

Petitioner's argument ignores the fact that it is the very act of compliance—not the status of the party that complies—that ends the controversy sur-

[29] In *Arthur Andersen & Co.*, the court of appeals declined to decide whether a case involving a third party that lacked "sufficient incentive to risk contempt in order to avoid compliance with [a] summons" would present a "compelling circumstance[]" that would justify "deciding an otherwise moot case." 623 F. 2d at 725. No court has held that a moot case becomes justiciable if "compelling circumstances" exist.

rounding the enforceability of the summons. As Judge Garth explained in his dissenting opinion in *Gluck* (771 F.2d at 760 n.2; emphasis added):

> However, because compliance may result from the actions of a third party does nothing to ensure that future proceedings, in which the introduction of information obtained by means of a challenged summons is sought, will be initiated. *Whether the taxpayer himself or some third party complies is thus ultimately irrelevant to the mootness issue.* This is necessarily so since it is the very act of compliance, rather than the individual or institution which complies, that ends the controversy surrounding the enforceability of any particular summons. *Until some subsequent proceeding is commenced, no concrete controversy demanding decision exists.*

CONCLUSION

The order of the court of appeals dismissing the appeal as moot should be affirmed.

Respectfully submitted.

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